SUPREME COURT, U. S.

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No. 73-229

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

MARSHALL P. SAFIR,

Petitioner,

v.

ROBERT W. BLACKWELL, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI FOR RESPONDENT BLOOMFIELD STEAMSHIP COMPANY

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Bloomfield Steamship Company, a party to the Maritime Subsidy Board proceeding which underlies this matter and to the proceeding in the Court of Appeals for the Second Circuit, review of which is sought here, opposes the petition for a writ of certiorari.[1] The Court

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[1] Although petitioner failed to name Bloomfield Steamship Company a respondent in his petition for certiorari, it is properly a party under this Court's Rule 21(4).

below in refusing to review a decision of the Maritime Subsidy Board which is not final, and which is not reviewable in the first instance in a Court of Appeals, has not departed from the "accepted and usual course of judicial proceedings;" its judgment does not conflict with any decision in another circuit; and the case presents no issue of public importance.

OPINIONS BELOW

Petitioner requested review of a Maritime Subsidy Board order (App. 15a)[2] by his "motion" filed directly in the Court of Appeals. The motion was denied by order of the Court of Appeals on May 16, 1973 (App. 1a).[3]

JURISDICTION

The Court of Appeals order was entered on May 16, 1973; the petition for a writ of certiorari was filed on August 2, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1970).

STATUTE INVOLVED

Section 810 of the Merchant Marine Act of 1936, 46 U.S.C. §1227 (1970) (App. 197a).

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[2]References to App. are to petitioner's bound Appendix.

[3]Other aspects of this litigation have been reported in Safir v. Gulick, 297 F. Supp. 630 (E.D.N.Y.), rev'd, sub nom. Safir v. Gibson, 417 F.2d 972 (2nd Cir. 1969); Safir v. Gibson, 432 F.2d 137 (2nd Cir.), certiorari denied, 400 U.S. 850 (1970); Safir v. Gibson, 330 F. Supp. 225 (E.D.N.Y. 1971); and Safir v. Blackwell, 469 F.2d 1061 (2nd Cir. 1972).

QUESTIONS PRESENTED

The questions presented are (1) whether an order of the Maritime Subsidy Board is subject to review in the first instance in a Court of Appeals and (2) if so, whether review is premature where (a) the order is not a final order and (b) the parties have not been given the opportunity to exercise their right of administrative appeal to the Secretary of Commerce.

COUNTERSTATEMENT OF THE CASE

The Maritime Subsidy Board initiated a proceeding, Docket S-243,[4] on October 24, 1969 to investigate whether Section 810 of Merchant Marine Act, 1936 (46 U.S.C. §1227) had been violated and, if so, the appropriate action which should be taken.[5] Nine shipping lines, including Bloomfield Steamship Co., were named parties, along with Sapphire Steamship Lines, Inc., and its original owners Marshall Safir and Arnold Weissberger. The nine shipping lines (1) held operating subsidy contracts during the eleven-month period in question and (2) were members of AGAFBO (an association of US-flag

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[4] Administration of the Merchant Marine Act, 1936 rests with the Secretary of Commerce, Department of Commerce Reorganization Plan No. 7 of 1961 (75 Stat. 840, 26 Fed. Reg. 7315 [1961]), who has delegated a part of these functions to the Maritime Subsidy Board. Department of Commerce Organization Order No. 10-8 (37 Fed. Reg. 15179 [1972]).

[5] Section 810 makes it unlawful for carriers holding operating subsidy contracts to "continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other U.S. carrier operating U.S. vessels on a U.S. trade route." The penalty for engaging in such conduct may be the forfeiture of subsidy.

carriers organized to negotiate with the Government about military cargo). The investigation is focused on whether these carriers violated Section 810 when AGAFBO reduced rates on military cargo to meet rates offered by Sapphire Steamship Lines, Inc., and if so, whether, and to what extent each carrier should be penalized.

The proceeding before the Board has not been completed. On April 16, 1973, the Maritime Subsidy Board issued an "Opinion and Order" making preliminary determinations. The Board required additional data from the carriers so that it could decide what penalties it should order. It deferred a final decision in the case until the submissions are considered. Thus, the order states:

> "Trade respondents, and public counsel as it deems necessary, are to submit on or before May 16, 1973, their views and supporting documentation on the exact ODS amounts recoverable for violation of Section 810 consistent with the decision herein. Any replies to such submission are to be filed within 10 days after service of such submission. An order determining final recoveries will thereafter be issued. Upon issuance of said order on final recoveries this decision will become final." (App. 87a)[6]

The parties' views on recoveries have been submitted to the Board; a final decision in the case is imminent.

Shortly after the Board's Order of April 16, 1973 was issued, petitioner went directly to the Court of Appeals

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[6]In response to an inquiry from Public Counsel, the Board confirmed that its decision of April 16, 1973 was not a final determination of the issues. Letter from James S. Dawson, Jr., Secretary, Maritime Subsidy Board to Michael J. McMorrow, May 8, 1973 (App. 10a). This letter states that the order lacks finality and cannot yet be appealed to the Secretary of Commerce, under agency regulations.

for the Second Circuit and filed a "motion" pro se asking that the Board's decision be set aside and the Court increase the penalties on the nine carriers. The Government and the carriers moved to dismiss that "motion" because a Maritime Subsidy Board order is not directly reviewable in the Court of Appeals and because any such review is premature. The order denying petitioner's "motion" was issued on May 16, 1973 (App. 1a).

ARGUMENT

The Court of Appeals properly refused to review the Maritime Subsidy Board order. Its action accords with well-established legal principles of this Court, and the Courts of Appeal, and raises no issue of public importance.

I.

PETITIONER IMPROPERLY SOUGHT REVIEW IN THE COURT OF APPEALS

Petitioner attempted to review a Maritime Subsidy Board decision directly in the Court of Appeals for the Second Circuit—a court lacking jurisdiction to review that agency's orders. The jurisdiction of the Court of Appeals is statutory. *United States v. Agne*, 161 F.2d 331, 332 (3rd Cir. 1947). As this Court has explained:

> "The Court of Appeals for the District of Columbia, like the several circuit courts of appeals, is without the jurisdiction over original suits conferred on district courts.... Such jurisdiction as it has, to review directly the action of administrative agencies, is specially conferred by legislation relating specifically to the determinations of such agencies made subject to review, and prescribing the manner and extent of the review."

American Federation of Labor v. National Labor Relations Board, 308 U.S. 401, 404 (1940). In the absence of a specific statutory provision for review of administrative action in the first instance, the Court of Appeals lacks jurisdiction. See *Arizona Department of Public Works v. HEW,* 449 F.2d 456, 464 (9th Cir.), certiorari denied 405 U.S. 919 (1971); *Robertson v. F.T.C.,* 415 F.2d 49, 54-55 (4th Cir. 1969); *Rettinger v. F.T.C.,* 392 F.2d 454, 456-7 (2d Cir. 1968); *Turkel v. Food and Drug Administration,* 334 F.2d 844, 846 (8th Cir. 1964); *Schwab v. Quesada,* 284 F.2d 140, 143 (3rd Cir. 1960); *City of Dallas, Texas v. Rentzel,* 172 F.2d 122, 123 (5th Cir. 1949), certiorari denied 338 U.S. 858 (1949).

There is no statutory authorization for judicial review of Maritime Subsidy Board decisions under the Merchant Marine Act, 1936 directly to the Courts of Appeal. Petitioner should first seek judicial review of the agency's decision in the district courts. See, e.g., *Sea-Land Service, Inc. v. Connor,* 418 F.2d 1142 (D.C. Cir. 1970); *American Mail Line, Ltd. v. Gulick,* 411 F.2d 696 (D.C. Cir. 1969); *United States v. Marietta Manufacturing Co.,* 268 F. Supp. 176 (S.D. W.Va. 1967); *American President Lines, Ltd. v. Federal Maritime Board,* 112 F. Supp. 346 (D. D.C. 1953). See also *Safir v. Gulick,* 297 F. Supp. 630 (EDNY) reversed sub. nom *Safir v. Gibson,* 417 F.2d 972 (2d Cir. 1969); *Safir v. Gibson,* 432 F.2d 137 (2d Cir.), certiorari denied 400 U.S. 850 (1970); and *Safir v. Gibson,* 330 F. Supp. 225 (EDNY 1971) (where petitioner sought and secured review of Board action in the district court).

II.

PETITIONER SEEKS REVIEW PREMATURELY

Petitioner has attempted to review the Maritime Subsidy Board's decision in Docket S-243, before the agency has made its final decision in the case. The agency's Order of April 16, 1973 discusses the possible liability of various parties for subsidy refunds under Section 810 of the Act and instructs the parties to make additional submissions. A final decision is deferred until these submissions are considered.[7] Yet, petitioner asks this Court to grant a writ of certiorari to determine whether the Maritime Administration has made a proper determination with respect to subsidy recoveries when it has never made any final determination on these penalties at all.

The Court of Appeals in denying petitioner's "motion" for review, at this time, acted in accordance with long-standing judicial precedent. This Court has emphasized that the courts should not interfere with an administrative agency until it has completed its action. See *McKart v. United States*, 395 U.S. 185, 194 (1969). The Administrative Procedure Act, 5 U.S.C.A. §704 provides for judicial review of "final action"; review of preliminary, procedural, or intermediate "agency action" is deferred. Judicial review is deferred to permit the administrative process to proceed in an orderly manner. It awaits a time when rights or obligations are established or legal consequences flow from the agency action. See

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[7]The Order of April 16, 1973 states this plainly: "Upon issuance of said orders on final recoveries this decision will become final." (App. 87a)

Port of Boston Marine Terminal Assoc. v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970).[8]

Petitioner has requested review of the Maritime Subsidy Board's determination of subsidy recovery before the Board has fixed such penalties—before any rights or obligations are established, or legal consequences can result. If granted, such review would disrupt the last stages of the agency proceeding. Moreover, in prematurely seeking review, petitioner is foreclosing other parties from seeking review by the Secretary of Commerce. Under agency regulations, the Secretary may review Maritime Subsidy Board decisions either on his own motion or on the basis of a petition filed by a party.[9] But, as the Secretary of the Maritime Subsidy Board has confirmed, until the Board decision in Docket S-243 is made final, none of the parties may seek Secretarial review. Petitioner's attempt to short-circuit the ordinary review process deprives the parties, as well as the Secretary of Commerce, of important rights. The Court of Appeals properly refrained from untimely interference in the agency process. *Toilet Goods Association v. Gardner,* 387 U.S. 158, 162-165 (1967); *Sea-Land Service, Inc. v. Federal Maritime Commission,* 402 F.2d 631 (D.C. Cir. 1968).

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[8]For example, in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), heavily relied upon by petitioner, review was sought of the Secretary's decision committing federal funds to build a highway. The agency process had run its course; and the resulting action had direct legal consequences. The case is otherwise inapposite.

[9]46 CFR §202.1 setting forth Section 6 of Department Order 117A. The parties have a right to seek review by the Secretary of Commerce whether or not such an appeal is "discretionary" in the sense that a party need not seek Secretarial review prior to seeking judicial review of a final Board order under 5 U.S.C.A. §704.

CONCLUSION

For these reasons the petition for certiorari should be denied.

Respectfully submitted,

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